Rexall Corporation[1] ***and*** **Office & Professional Employees International Union, Local 13, AFL-CIO.** Cases 14-CA-14549 and 14-RC-9250

October 18, 1982

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN VAN DE WATER AND MEMBERS JENKINS AND HUNTER

On September 29, 1981, Administrative Law Judge Benjamin Schlesinger issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.[2]

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[3] and conclusions of the Administrative Law Judge, as modified herein.

1. The Administrative Law Judge found that the preelection statements Data Processing Manager Swaine made to employees concerning layoffs he experienced as a union-represented employee working for Respondent, and about certain restrictive employment conditions under which only Respondent's unionized employees worked, implicitly threatened employment loss and loss of benefits if the Union won the election, and, therefore, violated Section 8(a)(1) of the Act. We disagree.

On December 3, 1980, Swaine met with 11 office employees to discuss the union campaign. He reeled off various points regarding the Oil, Chemical, and Atomic Workers Union (OCAW), the union that represented Respondent's production and maintenance employees. He explained that he began working for Respondent in 1963, in the bargaining unit represented by OCAW, and that, in his experience, there had been layoffs when work got slow. He displayed a copy of the current labor agreement between OCAW and Respondent and pointed out the section of the contract that prohibited sympathy strikes by employees covered by the contract. Swaine brought up the subject of timeclocks and noted that the OCAW unit employees had to punch one, while the unrepresented employees did not. He also held up a copy of an attendance control program, a disciplinary system based on point assessment that did not affect the office employees, but was an incorporated part of the OCAW contract. Swaine informed them that a copy of this program, as well as the contract itself, would be available in his office for them to read, if they wished to do so. With respect to the attendance control program and, similarly, in connection with his comments concerning timeclocks, Swaine credibly testified that he made it clear that these items, and ones like them, would have to be negotiated, that the appearance of the Union on the scene would not mean that changes would be automatically forthcoming.[4]

In support of his conclusion that Swaine's statements reflected an attempt to convey threats of job loss and loss of benefits for voting in the Union, the Administrative Law Judge principally relied on evidence that Respondent had never laid off data processing employees when work had been slow; that timeclocks and an attendance control program had never been applied to these employees; and that Swaine raised a spectre of layoffs and attendance control although those issues had not been raised in the election campaign. He characterized Swaine's remarks as predictions, found they had no basis in objective fact, and concluded, citing *N.L.R.B.* v. *Gissel Packing Co., Inc.*, 395 U.S. 575 (1969), that such statements constituted unlawful, veiled threats of reprisals.

The Administrative Law Judge's findings in this respect do not withstand analysis because Swaine did nothing more than truthfully describe his own experience as a bargaining unit employee and accurately represent specific provisions in a labor agreement under which Respondent's own production and maintenance employees worked.[5] His state-

[1] The name of Respondent appears as amended at the hearing.

[2] The General Counsel has not excepted to the Administrative Law Judge's dismissal of certain portions of the complaint.

[3] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[4] The Administrative Law Judge noted that Swaine replied, "That does not make sense to me," when he asked him why he told the employees that layoffs would have to be negotiated. The record reveals that the Administrative Law Judge was uncertain as to what exactly Swaine's testimony was in this respect. Swaine agreed with the Administrative Law Judge that the juxtaposition of layoffs and negotiations did not make sense. Immediately thereafter, he attempted to clarify his testimony by explaining that he raised the subject of layoffs in connection with his own union experience, and negotiations with his discussion of the OCAW contract. Swaine testified earlier in the hearing that he did not tell the employees that layoffs would result if they voted for the Union, but rather that he had said, "[E]verything has to be negotiated on what you're going to get and the only thing I'm trying to show was what one Union has and one especially that was in Rexall."

[5] The General Counsel did not dispute Swaine's assertion that Respondent periodically laid him off during his tenure as an employee in the OCAW bargaining unit. Nor did the General Counsel challenge the accuracy of Swaine's description of selected terms and conditions of employment under which Respondent's union-represented employees worked. Indeed, those employees who attended the preelection meeting need only have looked as far as their own coworkers to verify everything Swaine

Continued

ments elucidated some of the economic realities of the collective-bargaining process and suggested certain specific possibilities based on an actual bargaining relationship between Respondent and a union that represented employees who worked at the same facility.[6] Swaine merely brought to his listeners' attention a partisan account of the drawbacks, rather than the advantages, associated with union representation. Further, by repeatedly expressing to employees the *caveat* that he was not telling them that changes would occur, only that they could occur, depending on the outcome of collective bargaining, Swaine unequivocally eliminated any implication that Respondent intended to withdraw benefits unilaterally if the Union came in.

In *Gissel, supra* at 618, the Supreme Court stated, in pertinent part, that:

> [A]n employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a "threat of reprisal or force or promise of benefit." He may even make a prediction as to the precise effect he believes unionization will have on his company. In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control or to convey a management decision already arrived at to close the plant in case of unionization.

Inasmuch as Swaine neither expressly nor implicitly predicted what impact unionization would have on Respondent, nor did he threaten employees with reprisals, if the Union won the election, the Administrative Law Judge's citing of *Gissel* was inapposite. Swaine's statements were expository in nature and, as such, fell squarely within the ambit of speech protected by Section 8(c) of the Act. Accordingly, we shall dismiss that portion of the complaint alleging that his comments violated Section 8(a)(1).

2. Similarly, we disagree with the Administrative Law Judge's conclusion that the statements by another of Respondent's supervisors, Linda Pryor, during the first week in December, violated Section 8(a)(1) of the Act.

In finding this violation, the Administrative Law Judge relied on Pryor's own account of the incident in question. Pryor testified that she and a few employees were eating lunch and discussing working conditions when either she or someone else brought up the subject of a timeclock that office employees used to punch. The conversation progressed and she told them, with respect to her willingness to allow two employees to leave 5 minutes early to catch a bus, that such a benefit would become a negotiable item if the Union were to be elected. Based on the foregoing, the Administrative Law Judge found that Pryor took advantage of the timeclock issue, which by then had become an area of employee concern, and, therefore, that her comments were intended to impart an implicit threat that timeclocks possibly would be reinstated. In addition, he found that by mentioning her practice of allowing employees to leave early, she purposefully intended to imply that a union victory could signal the end of that benefit.

Our reading of the record, however, convinces us that Pryor's remarks were neither coercive nor threatening. Rather, the remarks were casual and accurate statements that hours of work and the means of monitoring them would become the subject of negotiations if the Union won the election. Thus, we find that these statements too were well within the limits of lawful speech protected by Section 8(c), and, accordingly, we shall dismiss this portion of the complaint as well.

Having adopted the Administrative Law Judge's findings that Respondent violated Section 8(a)(1) by threatening employee Gillham with discharge and employee Beard and others with the loss of certain existing benefits, and thereby also engaged in objectionable conduct, we shall order that the election be set aside and that a second election be held. Inasmuch as we have reversed the Administrative Law Judge's findings that Swaine's statements to a group of employees and Pryor's comments to employee Mueller and others violated Section 8(a)(1), we shall modify the Administrative Law Judge's recommended Order accordingly.

CONCLUSIONS OF LAW

1. Rexall Corporation is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Office & Professional Employees International Union, Local 13, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent, through Supervisor Edward J. Swaine, violated Section 8(a)(1) of the Act by threatening employee Sherry Gillham with possible discharge pursuant to an attendance control pro-

---

had said concerning timeclocks, attendance controls, and the like. See *Montgomery Ward & Co., Incorporated*, 219 NLRB 1196, 1197 (1975). In addition, Swaine informed them that he would make the OCAW contract and the attendance control program available for their review.

[6] See *Checker Motors Corporation*, 232 NLRB 1077, 1080 (1977); cf. *The Dow Chemical Company, Texas Division*, 250 NLRB 756, 760 (1980) (employer's portrayal of its unrepresented employees' benefits during the course of a decertification election campaign protected by Sec. 8(c) of the Act).

gram, if the employees elected to be represented by the Union.

4. Respondent, through Supervisor Linda Pryor, violated Section 8(a)(1) of the Act by threatening employees at a preelection meeting with the loss of existing benefits if the employees elected to be represented by the Union.

5. The foregoing unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

6. Respondent did not violate the Act in any other respect.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Rexall Corporation, St. Louis, Missouri, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Threatening employees with possible discharge pursuant to an attendance control program if they elect to be represented by Office & Professional Employees International Union, Local 13, AFL-CIO.

(b) Threatening employees with the loss of existing benefits if they elect to be represented by the Union.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the purposes of the Act:

(a) Post at its place of business in St. Louis, Missouri, copies of the attached notice marked "Appendix."[7] Copies of said notice, on forms provided by the Regional Director for Region 14, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director for Region 14, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the complaint in Case 14-CA-14549 be dismissed as to those allegations not specifically found to be violative of the Act.

IT IS FURTHER ORDERED that the election of December 19, 1980, in Case 14-RC-9250 among the Employer's employees be, and it hereby is, set aside, and that said case is hereby remanded to the Regional Director for Region 14 for purposes of conducting a second election, as directed below.

[Direction of Second Election[8] and omitted from publication.]

MEMBER JENKINS, dissenting in part:

Contrary to my colleagues, I would adopt the Administrative Law Judge's findings that Respondent violated Section 8(a)(1) of the Act by: (1) on December 3, 1980,[9] Data Processing Manager Swaine's implicitly threatening employees with layoffs and loss of benefits if the Union won the election; and (2) in the first week of December, Supervisor Pryor's threatening employees with loss of benefits and more restrictive work rules if the Union won the election. In all other respects, I concur with the findings made by my colleagues.

As found by the Administrative Law Judge, on December 3 Swaine held a meeting with 11 data processing employees. During the course of the meeting, Swaine raised the spectre that layoffs, installation of timeclocks, and a restrictive attendance policy all could result from a union election victory. Swaine's statements were not in response to any issue in the campaign and the data processing employees in the past never had been laid off, never had been required to punch timeclocks, and never had been subject to the type of restrictive attendance policy raised by Swaine. Under these circumstances, the Administrative Law Judge found that Swaine's remarks were intended solely to create a fear that these policies and layoffs were possible only if the Union won the election and were part of what it meant to become union members. In this regard, the Administrative Law Judge noted that the veiled threat of layoffs particularly was meaningful because at the very time Swaine made his remarks there had been substantial layoffs of other employees represented by the Union.

Even assuming that Swaine repeatedly stated that the changes he referred to would have to be negotiated,[10] I believe that the Administrative Law

[7] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[8] [*Excelsior* footnote omitted from publication.]

[9] Unless otherwise noted, all dates are 1980.

[10] I note that the majority places great weight on their finding that Swaine repeatedly stressed that such changes would have to be negotiated. While the Administrative Law Judge assumed that fact to be true for the limited purpose of his analysis, he specifically discredited Swaine's

Continued

Judge properly analyzed Swaine's statements under the standards for such predictions set forth in *N.L.R.B.* v. *Gissel Packing Co., Inc.*, 395 U.S. 575 (1969). As was stated in *Piggly Wiggly, Tuscaloosa Division Commodores Point Terminal Corporation*, 258 NLRB 1081, 1092 (1981):

> [W]hen an employer advises its employees of adverse consequences befalling employees following their selection of a collective-bargaining agent, there is always a fine line to distinguish between the inference that it is merely advising employees of potential adverse consequences which could flow from such selection, or whether it is impliedly threatening the inevitable likelihood that such consequences will flow to its employees in retaliation for their having selected the union as their collective-bargaining representative. This distinction must be drawn based on an analysis of the entire context of the conversation—indeed, the entire campaign.

Applying these principles to the instant case, it is apparent that Swaine's remarks were veiled threats of adverse consequences that would result if the Union were selected as the employees' representative. Thus, Swaine injected the issues of layoffs and more restrictive working conditions into a campaign where those issues had not been raised and where those items never had affected the employees he was addressing. And, though the majority chooses not to mention the fact, Swaine reinforced his implied threat immediately thereafter by threatening employee Gillham with discharge under the very attendance control program he mentioned in the meeting—a threat that even my colleagues find violative of Section 8(a)(1). Under these circumstances, I would adopt the Administrative Law Judge's conclusion that Swaine's statements violated Section 8(a)(1) of the Act, as alleged in the complaint.

I also disagree with my colleagues' reversal of the Administrative Law Judge's finding that, during the first week of December, Supervisor Pryor implicitly threatened office employees with more restrictive working conditions if the Union won the election. Examining the comments made by Pryor in context, as we must under the authorities cited above, and even assuming that Pryor stated that such restrictions would have to be negotiated,[11] it is clear to me that what Pryor was implying was that if the Union won the election it was possible that employees would have to punch timeclocks and would not be permitted to arrive and leave work before their scheduled times. It further was implied that, if the Union's campaign did not succeed, the status quo would be maintained. Such inferences are proscribed by Section 8(a)(1) of the Act. *L'Eggs Products Incorporated*, 236 NLRB 354, 388 (1978). Accordingly, I would adopt the Administrative Law Judge's finding that Pryor's remarks violated Section 8(a)(1) of the Act.

claim of having made such repetitions, finding that they "were stated to impress the factfinder rather than to state the facts." Unlike my colleagues, I am unwilling to disturb the Administrative Law Judge's credibility finding.

[11] Again, the majority has ignored the credibility findings of the Administrative Law Judge. By explicitly finding that Pryor stated that such restrictive working conditions were a matter to be negotiated and then by placing exclusive reliance on that finding in reaching their conclusion, the majority chooses to ignore the Administrative Law Judge's finding that it is "improbable" that Pryor conditioned her threats on the outcome of negotiations.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT threaten our employees with possible discharge pursuant to an attendance control program if they elect to be represented by Office & Professional Employees International Union, Local 13, AFL-CIO.

WE WILL NOT threaten our employees with the loss of certain existing benefits if they elect to be represented by the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed in Section 7 of the Act.

REXALL CORPORATION

DECISION

FINDINGS OF FACT AND CONCLUSIONS OF LAW

BENJAMIN SCHLESINGER, Administrative Law Judge: The instant proceeding, which was heard by me in St. Louis, Missouri, on April 27-28 and July 13-14, 1981, concerns 13 alleged violations of Section 8(a)(1) of the National Labor Relations Act, as amended, 29 U.S.C. § 151, *et seq.* (Act), which are also alleged to be objectionable conduct affecting the results of a representation election lost by Office & Professional Employees International Union, Local 13, AFL-CIO (Union). The Union filed an unfair labor practice charge on December 24,

1980, and a complaint issued on February 13, 1981, in Case 14–CA–14549. On the same date, the Acting Regional Director for Region 14 directed that the unfair labor practice complaint be heard with certain objections to the election in Case 14–RC–9250 and that the cases be consolidated. Respondent has denied all of the material allegations of the complaint and the objections; and I hereby issue this decision, based upon the entire record in this proceeding, as well as my observation of the demeanor of the witnesses and my review of the briefs filed by all parties hereto.

Respondent Rexall Drug Corporation, a corporation duly organized under and existing by virtue of the laws of the State of Delaware, has maintained a place of business in St. Louis, Missouri, where it is engaged in the manufacture, sale, and distribution of drugs and related products. During the year ending December 31, 1980, a representative period, Respondent in the course and conduct of its business operations purchased and caused to be transported and delivered at its above place of business, goods and materials valued in excess of $50,000, of which goods and materials valued in excess of $50,000 were transported and delivered to its place of business directly from points located outside the State of Missouri. I conclude, as Respondent admits, that it is now and has been at all times material herein an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

I further conclude, as Respondent admits, that the Union is and has been at all times material herein a labor organization within the meaning of Section 2(5) of the Act. On September 4, 1980,[1] the Union filed a petition for a representation election; and on November 25, the Regional Director for Region 14 directed an election in the following described appropriate collective-bargaining unit of Respondent's employees:

> All office clerical employees, contract coordinators, mailroom and print shop employees, copy employees, key punch operators, computer operators, control clerks, excluding professional employees, technical employees, confidential and managerial employees, all other employees and guards and supervisors as defined in the Act.

An election was held on December 19, and the Union filed timely objections on December 24. A revised tally of ballots was served upon the parties on February 6, 1981, disclosing 35 votes cast for the Union, 53 votes against the Union, and 8 challenged ballots.

Five of the alleged unfair labor practices occurred on December 3 at a meeting of 11 data processing department employees called by Manager Edward J. Swaine, who conceded that he said: (1) that Respondent did not want the Union, and he did not, either; (2) that he had commenced employment with Respondent as a member of the Oil, Chemical & Atomic Workers Union (OCAW), which represented Respondent's production and maintenance employees, and he was laid off from time to time because work was slow and Respondent wanted to save money; (3) and that OCAW employees had to punch timeclocks and were governed by an attendance control program, and his employees were not. Swaine insisted, however, that, whenever he mentioned layoffs, timeclocks, or attendance controls, and their applicability to his employees, he repeatedly cautioned that his remarks did not mean that employees were going to be laid off and that attendance controls would be put into effect, but that such would be negotiated with the Union.

Respondent's defense, in essence, rests on the premise that Swaine never said that these threats *would* be the necessary result of a union victory, but that they *could* be the result, and that in any event such would result from negotiations.[2] That does not insulate Respondent from what remain as veiled threats to employment and imposition of less beneficial terms and conditions of employment, caused solely by the employees' turning to the Union. It was uncontradicted that data processing employees had never been laid off, despite the fact that work had often been slow. The employees had never had either a point system controlling their attendance or timeclocks. Swaine's raising of the spectre of layoffs and attendance control was in response to no issue of the election campaign. Rather, it was intended solely to create a fear that there was such a possibility only if the Union won the election, and that layoffs and timeclocks were part of what it meant to become union members. That became particularly meaningful, because, at the very time, there had been a substantial layoff of OCAW employees, and there were only 200 of some 350–375 employees in Respondent's facility.

The employees could hardly misunderstand the import of Swaine's remarks, and his constant repetition of "it would have to be negotiated" does not relieve his veiled threats of layoffs, tighter controls on attendance, and possible discharge for violations of the attendance controls. In *N.L.R.B.* v. *Gissel Packing Co.*, 395 U.S. 575, 618 (1969), the Supreme Court cautioned that, because an employer's economic predictions are particularly susceptible to abuse, such predictions must be "carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control . . . . If there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coercion . . . ." On the basis of Swaine's testimony alone, there was no reason presented for the layoff of these employees, other than the Union winning the election. This would result "not from the inevitable forces of the market, but from the deliberate acts of the company taken in reprisal. *N.L.R.B.* v. *Kaiser Agricultural Chemicals, a Division of Kaiser Aluminum & Chemical Corpora-*

[1] All dates hereinafter set forth refer to the year 1980, unless otherwise stated.

[2] I have assumed herein that Swaine repeated his statement that everything would have to be negotiated. Actually, I found that his repetitions were stated to impress the factfinder rather than to state the facts. When I asked him why he stated to employees that layoffs would have to be negotiated, Swaine replied: "That does not make sense to me. . . ."

tion, 473 F.2d 374, 381 (5th Cir. 1973). I conclude that Swaine's veiled threats violated Section 8(a)(1) of the Act (pars. 5B, C, and D of the complaint). *General Electric Company*, 255 NLRB 673, 690 (1981); *American Sunroof Corporation*, 248 NLRB 748, 766 (1980); *Aero Corporation*, 237 NLRB 455, 458 (1978); *The Buncher Company*, 229 NLRB 217, 226 (1977).

I also find it probable that, immediately after the meeting, Swaine told Sherry Gillham that she would be most particularly interested in the attendance control program because of her high absenteeism, that it would affect her personally, and that she had accumulated so many points under it that she would be terminated. Indeed, Gillham's poor attendance made her a likely object for Swaine's comment that the program would have a particular meaning for her. I conclude that Swaine threatened her with possible discharge as alleged in paragraph 5E. I do not, however, find that Swaine specifically told the employees that Respondent was going to fight the Union to the end and that the employees would be a lot worse off with the Union, as alleged in paragraph 5A of the complaint. The testimony of General Counsel's witnesses was too confused, inconsistent, and contradictory to support this allegation;[3] and I credit Swaine's denial. That paragraph is, therefore, dismissed.

Timeclocks and more onerous working conditions were the subject of three alleged violations by Lynda Pryor, supervisor of the accounts payable and receivable department. Patsy Ann Mueller testified that during the first week in December, while she, Pryor, and other employees were eating in Respondent's cafeteria, Pryor said that if the Union won the election, timeclocks would be brought in; and that, although until then she had been letting employees go home 5 minutes early to catch a bus, that practice would stop.

Employee Trollie Beard testified that Pryor had a meeting in her office on December 16 with several of her employees. She told the employees of the date when the election would be held, that it was important for everyone to vote, and that the employees should keep in mind that they now had certain privileges that they "will" no longer have, to wit: (1) personal telephone calls, which instead of being made at their own desks through separate telephone extensions, would have to be made through the switchboard operator; (2) break time, during which employees were then free to go anywhere in the premises, but would in the future be limited to a certain area; and (3) leaving early and reporting early, which would no longer exist. On cross-examination, Beard conceded that Pryor did not say that breaktime *would* be taken away, but that if the Union got in, it was *possible* that it would be taken away.

Pryor denied all allegations of wrongdoing. She stated that her conversation with Mueller, with whom she occasionally had lunch, was misinterpreted. What she really was talking about was the fact that there used to be a timeclock outside of the cafeteria and that office employees had to clock in and out. She admitted having said that she had two employees who regularly left 5 minutes early and reported to work 5 minutes early, but she added that that was a negotiable item. Pryor's narration of the meeting with her employees was also quite different from what Beard had testified to. Pryor said that she merely was comparing the working conditions of OCAW employees with those of her employees and noted that the factory workers do not get phone calls, do not have extended lunch hours, and cannot use the cafeteria. These are benefits that her employees take for granted, said Pryor, who denied that she said they would stop.

I found Beard to be a reliable witness and note that, as a former employee, she had absolutely nothing to gain by testifying adversely to Respondent. She exhibited no bias, and her testimony was strong, direct, and sincere. The benefits about which Pryor spoke were clearly meaningful, if not all to Beard, certainly to other employees. They would be reluctant to place personal telephone calls through the switchboard, whereas with their own telephone extensions, they were obviously free to do so. Leaving early was of benefit to at least two employees. Their inability to visit friends or go to the cafeteria at lunch, and instead the threatened limitation to their mobility, was of concern to all employees. In sum, I conclude that, contrary to Pryor's denials, there was an open threat to take away benefits, which was not relieved by any comment that the loss *might* result from collective-bargaining negotiations.[4]

I was not wholly satisfied with Mueller's testimony, but Pryor's admitted references to the timeclocks that office workers had to punch in the past and to her practice of permitting employees to come to work and leave early may not be considered *in vacuo*. In the context of Respondent's antiunion campaign, timeclocks were evidently an issue of employee concern; and Pryor took advantage of it. Her reminder to Mueller of Respondent's past practices was intended to impart the thought that timeclocks could be reinstalled. Her mention of her permission to employees to come to work and leave early was similarly intended to imply that such may not continue, solely as a result of the Union's election victory. Accordingly, her statements were just as much veiled threats as were Swaine's statements. I conclude that Respondent has violated Section 8(a)(1) of the Act (pars. 5G, H, and K of the complaint).

Paragraphs 5F and J involved allegations that on December 4 and 9, Harry R. Jones, then Respondent's director of the data processing department, stated to Clouser and Carter that if the Union won the election, bargaining would start from zero and benefits would,

[3] Inconsistencies, contradictions, testimony about events missing in earlier recorded recollections (either notes and investigatory affidavits), and answers to leading questions compel the conclusion that, unless such testimony was otherwise corroborated by Respondent's witnesses or as otherwise found herein, little credence should be given to the testimony of Gillham, Grace Clouser, and Bessie Carter—whose testimony was much in conflict. My crediting them with respect to Swaine derives from Swaine's admissions *and* focusing on the answer to "'[W]hat did the speaker intend and the listener understand?'", a question quoted in *Gissel Packing Co.*, 395 U.S. at 619, quoting A. Cox., Law and the National Labor Policy 44 (1960). The words used by the employees often reflected, rather than Swaine's actual words, what Swaine was intending; and, despite the inherent difficulty presented by the conflicting accounts, the words constituted threats in violations of the Act.

[4] Here, again, I have assumed that, at a lunchtime gathering, Pryor stated that this was a matter to be negotiated. I find that improbable.

too. As noted above, I was not impressed with Clouser's ability to clearly recall events. Carter, although testifying on direct examination that Jones said that none of employee benefits were guaranteed and bargaining would start from "scratch," testified on cross-examination (contrary to Clouser) that Jones' comments were made while he was reading a speech and that Jones stated that, in collective bargaining, one does not know how negotiations wind up, and that benefits could go up, they could stay the same, or they could go down. Jones testified that he read his speech *verbatim* and, even when Clouser asked after the speech whether benefits could begin at ground zero, he restated that portion of the speech that benefits could go up, remain the same, or decrease. His speech accords with laws, and his testimony was supported by Carter during her cross-examination. Because there was no threat "of loss of existing benefits . . . [leaving] employees with the impression that what they ultimately receive depends upon what the union can induce the employer to restore," I conclude that Respondent has not violated the Act and dismiss paragraphs 5F and J of the complaint. *Taylor-Dunn Manufacturing Company*, 252 NLRB 799 (1980).

Two other allegations refer to those speeches given by Respondent's president, Larry Weber, on December 18.[5] A number of witnesses testified in support of the allegations that he threatened employees (1) with loss of their seniority and (2) loss of direct access to Respondent's management. Once again, inconsistency was the keynote of the General Counsel's testimony. Clouser recalled little about the speech and the General Counsel had to elicit the following testimony with a leading question: Weber stated that he thought Respondent had an open-door policy and he saw no need to bring in a third party (the Union). Clouser stated that Weber said nothing about loss of access. She also testified that employee Ruth Fretwell asked him if employees' benefits and seniority would cease if the election were won by the Union. Weber replied that he was not sure, that he would check, and he would let the employees know; but he did not. Gillham corroborated, only after her recollection was refreshed, that Fretwell asked the same question, but that Weber's answer was somewhat different—Weber said that benefits would cease at the time negotiations began, but he did not know, he would check on it, and he would let everyone know. As to the remainder of the meeting, Gillham could recall only that Weber stated that Respondent had always conducted its business on a one-to-one basis, and he could not see why employees would want a third party involved.

Employees Rose Anne Johnson and Mueller attended a different speech by Weber the same day. Johnson's testimony was that Weber stated that, if the Union won the election, employees would lose their individuality and the ability of management to deal with employees on a one-to-one basis. The reason for this was that the Union was to serve as the employees' representative, and management would have to deal with the Union. Mueller's initial testimony was that, if the Union won, employees would lose their one-to-one relationship with management and that a third party (Union), unfamiliar with Respondent, would "interfere" with the employment relationship. On cross-examination, her attention was called to her investigatory affidavit which attributed to Weber the statement that the Union would become "involved" in the employment relationship—a statement which Mueller adopted in her testimony, discarding the previously alleged "interference." Mueller also testified, but only when her recollection was refreshed, that Weber stated that employees would be classified as numbers, instead of names.

Beard attended a third speech of Weber. Her testimony was that Weber stated that, at present, Respondent treated its employee as individuals; but, if the Union won, employees would lose their individuality. On cross-examination, Beard explained that Weber discussed the collective-bargaining process and explained that the Union would be the representative of employees, that Respondent would have to deal with the Union rather than the employees individually, and that would result in uniformity where certain long term employees might lose something.

Weber specifically denied all the more damaging allegations made against him, stating that he answered Fretwell's question with a "no" and that he said nothing about loss of individuality and that employees would be treated as numbers rather than names. He also admitted that he discussed some of the topics testified to by the employees, but his statements were generally that the "third party" would intrude upon the one-to-one relationship in bargaining and that the relationship would not be preempted.

I credit Weber's narration, finding that he was forthright and testified with candor; and I conclude that his speech did not violate the Act regarding the employees, rights to maintain their individuality. It is quite accurate that, if the Union won the election, there would be a third party, which has been designated as the employees' exclusive representative for the purposes of collective bargaining. Although that does not mean that all individual rights are lost, Weber was referring to the collective-bargaining process; and merely because he did not openly state that employees may still maintain their right to present their own grievances to Respondent and have them adjusted under Section 9(a) of the Act, so long as the adjustment is not contrary to an applicable collective-bargaining agreement, does not convert his remarks into illegal threats. Accordingly, I dismiss these allegations (pars. 5L and M).

The final alleged unfair labor practice was committed by Helen Henry, who according to certain employees threatened that Respondent would close its plant and move to Arkansas if the Union were elected. Substantial evidence was introduced to prove that she was a supervisor, a conclusion that Respondent vehemently opposed. I find it unnecessary to consider such proof. Henry was stipulated by both the Union and Respondent in Case 14–RC–9250 to be an employee in the bargaining unit.

[5] Weber testified that one of his speeches was given on December 19. Because that was the day of the election, because the Union filed no objections to a "captive audience" speech, and because all employees testified that the meetings were held on December 18, I find that he was in error.

She voted in the election. Respondent argues, with great appeal, that based upon the stipulation, it considered Henry to be an employee and did not counsel her, as it did other supervisors, about the requirements of the Act and the type of conduct which should be avoided. Thus, the argument proceeds, Respondent may not be charged with violations which it had no responsibility for and no means to ensure would not happen. I agree. In any event, the Board, in *Montgomery Ward & Co., Incorporated*, 115 NLRB 645, 647 (1956), enfd. 242 F.2d 497 (2d Cir. 1957), cert. denied 355 U.S. 829, has adequately disposed of this claim:

> Statements made by a supervisor violate Section 8(a)(1) of the Act when they reasonably tend to restrain or coerce employees. When a supervisor is included in the unit by agreement of the Union and the Employer and is permitted to vote in the election, the employees obviously regard him as one of themselves. Statements made by such a supervisor are not considered by employees to be the representations of management, but of a fellow employee. Thus they do not tend to intimidate employees. For that reason, the Board has generally refused to hold an employer responsible of the antiunion conduct of a supervisor included in the unit, in the absence of evidence that the employer encouraged, authorized, or ratified the supervisor's activities or acted in such manner as to lead employees reasonably to believe that the supervisor was acting for and on behalf of management.[10]

[10] *Indianapolis Newspaper, Inc.*, 103 NLRB 1750, 1751.

See also *Arcadia Foods, Inc.*, 254 NLRB 1012, fn. 3 (1981).

There are no credited facts occurring after the parties' stipulation which would lead to the conclusion that Henry's status changed or that Respondent encouraged, authorized, or ratified her acts or acted in any manner so that employees would believe that she was acting for Respondent. I, therefore, dismiss this allegation (par. 5I).

I conclude that the unfair labor practices which I have found herein affect commerce within the meaning of Section 2(6) and (7) of the Act.

The Objections

Because of the violations of Section 8(a)(1) which I have found herein, are coextensive with Union's Objections 6 and 9 and "Other Conduct Not Specifically Alleged in the Objections," as set forth in the Regional Director's Supplemental Decision and Order, dated February 13, 1981, I recommend that the election in Case 14–RC–9250 be set aside and said proceeding be remanded to the Regional Director for Region 14 to conduct a new election at such time as he deems that the circumstances permit the employees to exercise their free choice regarding the selection of a collective-bargaining representative. "Conduct violative of Section 8(a)(1) is, *a fortiori*, conduct which interferes with the exercise of a free and untrammeled choice in an election." *Dal-Tex Optical Company, Inc.*, 137 NLRB 1782, 1786 (1962). Contrary to Respondent's contentions, the impact of the conduct was not necessarily limited to the 15 or so employees who were present when Swaine and Pryor made their threats. "Experience has shown that statements made during election campaigns are the subject of discussion and repetition among the electorate." *Standard Knitting Mills, Inc.*, 172 NLRB 1122 (1968); *United Broadcasting Company of New York, Inc.*, 248 NLRB 403 (1980).

THE REMEDY

Having found that Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

[Recommended Order omitted from publication.]